SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1634

DELAWARE & HUDSON RAILWAY COMPANY, ET AL.,
Petitioners,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (including the appendices thereto), not yet officially reported, is set forth in the Appendix to the Petition at 1a-72a, and is unofficially reported at 76 LRRM 2900 and 65 Labor Cases ¶ 11,629. One of the appendices to that opinion sets forth the oral opinion of the District Court (Pet. App., at 56a-59a), and that oral opinion is unofficially reported at 76 LRRM 2898.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

When: (1) uniform proposals under Section 6 of the Railway Labor Act for changes in collective agreements have been served by the local committees of a union on each of the principal railroads of the country, and

(2) each such railroad has responded with uniform counterproposals, and

(3) such proposals and counterproposals have been negotiated, locally and on a joint national basis, through all the procedures of the Railway Labor Act without agreement having been reached, and

(4) the right to strike over the resulting dispute has concededly matured:

Then, does the Railway Labor Act require the union to strike, if at all, simultaneously on all the railroads involved, thus creating a national emergency, or does the union have the option of striking one or some of the railroads in pursuit of an agreement with all of them, so as to try to gain a settlement without bringing on a national emergency?

STATUTES INVOLVED

The Petition (pages 2-4) sets forth all the provisions of the Railway Labor Act that might conceivably be involved, but it is not clear to us from the Petition that Petitioners' differences with the Court of Appeals

turn on the construction to be given any of these provisions.[1]

STATEMENT

As indicated by our statement of the Question Presented, this dispute under the Railway Labor Act began, as have all such disputes in the past forty years that have been jointly nationally handled, with the service of uniform notices of proposed changes in the collective contract served pursuant to Section 6 of the Railway Labor Act on each of the principal railroads individually. Thereafter, pursuant to voluntary mutual agreements, after local conferences had been concluded, those railroads and those union committees that wanted to participate in joint national handling set up the customary apparatus for such handling. When all the procedures of the Railway Labor Act had been exhausted, and a Congressionally imposed additional postponement of the right to strike for about 80 days (Pub. L. 91-541) had expired, the union called a strike on two railroads, one in the West and one in the Southeast.

The District Court issued a preliminary injunction against the strike, holding that a strike against only some of the railroads involved was illegal, although concededly the union then had the right to strike all the involved railroads and struck the two in pursuit of a national agreement and not pursuant to any purpose in derogation of national handling. The Court of Appeals, upon an expedited appeal but after the most thorough consideration, unanimously reversed in a forty-page opinion with a forty-page appendix, and remanded the case to the continuing jurisdiction of the

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[1] See p. 4, *infra*.

District Court for such further proceedings as may become appropriate. (Pet. App. 1a-72a)

The Petition devotes some nine pages to a highly argumentative[2] statement of the facts. The Court of Appeals, in the opinion below, states the facts in great detail in almost exactly one half the space. We refer the Court to that statement (Pet. App. 2a-6a) for greater detail.

ARGUMENT

It takes some care to find just where Petitioners differ with the Court below on any point of law. Petitioners' complaint seems to be that the Court of Appeals accepted as fact, established by the uncontradicted testimony of the president of the union, that the genuine purpose of the union in striking two railroads was to get a national settlement, whereas Petitioners believe the purpose must have been to break up national handling because, according to them, that is an inevitable consequence of such a strike. So analyzed the difference resolves itself into one concerning the factual conclusions to be drawn from the evidence and is obviously not one appropriate for this Court's review.

Nevertheless, Petitioners are apparently arguing a point of law. At times that point seems to be that a strike against less than all the carriers has such inevitably destructive effects on national handling that, as a matter of law, that must be held to be its purpose, no matter what the evidence may be. (Pet., pp. 22-25).

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[2] E.g., the railroad proposals were "for changes in a number of obsolete work and pay rules" with an illustrative footnote (Pet., p. 4); a page and a half is devoted to the reasons for "national handling" (Pet., pp. 5-6); "huge" wage increases were recommended by Emergency Board No. 178 (Pet., p. 8); *etc.*

Elsewhere, Petitioners' argument seems to be, as the District Court held in this case, that a failure to make individual agreements (and thus to break up national handling) is unduly coercive on the individual railroad and hence illegal. (Pet., pp. 26-27).

These two arguments are inherently contradictory, but they have the virtue from Petitioners' point of view of both leading to the conclusion that the only strike permissible under the Railway Labor Act after national handling is a national strike regardless of the sincerity and good faith of the union's desire to negotiate a settlement with a minimum of harm to the public. This virtue is the more remarkable since the only statutory provisions the Petitioners' arguments can be predicated on are those imposing the duty to bargain in good faith and those expressing the overall purpose to minimize strikes.

I

THE DECISION BELOW IS CLEARLY CORRECT

As we have seen, the point of law decided by the Court below was the extremely narrow one rejecting Petitioners' contention that the Railway Labor Act never permits a union, after national handling, to strike less than all the carriers involved simultaneously. In support of its decision the Court rendered a most carefully reasoned and detailed opinion giving meticulous consideration to all of Petitioners' arguments. The opinion itself is the most eloquent exposition of the correctness of the decision.

Petitioners would have us believe that there is at issue a most difficult and thorny problem in the administration of the Railway Labor Act. This is not so. There has been national handling of railway labor dis-

putes that were appropriate for such handling for approximately forty years. During that time there have from time to time been selective strikes leading to national settlements. Judge Parker cites some of them in his opinion in *United Transportation Union* v. *Burlington Northern,* Civil Action No. 2183-70, quoted in the Appendix to the opinion below. (Pet. App. 60a, 68a-69a).

The only troublesome problem that has existed has arisen from the fact that in the last couple of years Petitioners have persuaded two District Court judges in the District of Columbia Circuit to issue preliminary injunctions against selective strikes[3] and the Court of Appeals has not heretofore reviewed such an order. Now that it has reviewed one, all that is necessary is for this Court to allow that decision to go into effect by denying the Petition.

What we have here contrasts sharply with what was presented in the cases Petitioners cite (Pet. p. 17) for the proposition that on several occasions in recent years this Court has seen fit to review issues relating to self-help in major disputes. *Shore Line* v. *Transportation Union,* 396 U.S. 142 (1969) involved the novel question

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[3] In the instant case and in *Alton & Southern Ry. Co.* v. *Internat. Assoc. of Mach. etc.,* reported as *Internat. Assoc. of Mach. etc.* v. *Nat. Ry. Lab. Conf.,* 310 F. Supp. 905 (D.D.C., 1970). *Chicago, B & Q R.R.* v. *Railway Emp. Dept.,* 301 F. Supp. 603 (D.D.C., 1969) which Petitioners cite as supporting the same proposition was an entirely different kind of case. It appears from the published findings and conclusions that this was not a case of a selective strike after national handling but rather a case of an attempted revision of a national agreement on an individual railroad. Actually it was an attempt to strike an individual railroad over a dispute concerning that railroad's administration of a national agreement.

of the carrier's right unilaterally to change working conditions that had not been the subject of agreement, in which counsel for the present Petitioners urged that the decision below conflicted with prior pronouncements of this Court. See 396 U.S. at 156. In *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369 (1969) this Court granted *certiorari* "to determine the extent of state power to regulate the economic combat of parties subject to the Railway Labor Act." See 394 U.S. at 372.[4] In *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966) the railroad, the unions and the United States all petitioned for *certiorari* in a case involving the novel question of the extent of a railroad's authority to change working conditions while a strike was going on. *Locomotive Engrs.* v. *B. & O. R. Co.*, 372 U.S. 284 (1963) was a *per curiam* opinion affirming the decision below in a case in which there was no reason to grant *certiorari*, except to disapprove an improvident expression in the opinion below. See 372 U.S. at 289. *Certiorari* was granted in the pending case of *Chicago and N.W.R. Co.* v. *United Transportation Union*, No. 189, for the obvious reason that there was a square conflict in the decisions of the Courts of Appeals in the Fourth and the Seventh Circuits. *Atlantic C.L.R. Co.* v. *Engineers*, 398 U.S. 281 (1970) involved no Railway Labor Act question that had not been settled in the Jacksonville Terminal litigation but did involve an important question of federal court jurisdiction to enjoin state court action.

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[4] That case does have some interesting commentary, by analogy, on Petitioners' expressed dismay at striking "an employer who is powerless to end the strike by agreement"; the Terminal Company was picketed in a dispute under the Railway Labor Act to which it was not even a party but this Court held that neither the Federal nor State Courts had any power to interfere. See 394 U.S. at 386-91.

In each of the cases on which Petitioners rely as precedents, there were ample reasons for granting *certiorari* that are not present here.

II

THE DECISION BELOW IS IN HARMONY WITH THE RULINGS OF THE NATIONAL LABOR RELATIONS BOARD

The Court below correctly concluded that "the National Labor Relations Board finds nothing illegitimate or inconsistent with free collective bargaining in a union's putting pressure on a multi-employer bargaining unit by striking individual employers." (Pet. App. pp. 26a-27a). In *Arizona District Council of Carpenters,* 126 NLRB 1110, 45 LRRM 1448 (1960), the Board clearly and unmistakably holds that a union's right to engage in a limited strike, following impasse in negotiations in a multi-employer bargaining unit, is recognized and respected by the federal labor policy expressed in the National Labor Relations Act where the purpose of the strike is to apply pressure on the association. *National Labor Relations Board* v. *Truck Drivers Union (Buffalo Linen),* 353 U.S. 87 (1957) and *National Labor Relations Board* v. *Brown,* 380 U.S. 278 (1965), upon which Petitioners apparently rely, deal with the converse issue of the right of the members of a multi-employer unit to lock out non-striking employees in response to a selective strike following impasse in association-wide bargaining. The fact is that these decisions sustain the Board's premise that the union has the right to engage in a selective strike in the circumstances which are present in this case. In *Buffalo Linen,* the Board defined its position before this Court as supporting "an accommodation . . . of both the union's right to strike in support of

contract demands and the employer's recognized interest in preserving the unity of their group bargaining position." (Briefs of counsel, *National Labor Relations Board* v. *Truck Drivers,* 1 L.Ed. 2d 2017). This Court, in sustaining the Board's position, explicitly rejected the view "that the Union strike constituted a withdrawal by the Union from the multi-employer bargaining unit", noting that, "On the contrary, the Union continued to carry on negotiations with the Exchange until an agreement was reached and signed." (353 U.S. at p. 94, ftnt. 22.) *National Labor Relations Board* v. *Brown, supra,* simply applies the *Buffalo Linen* principle to somewhat broader facts.[5]

Petitioners' statement in their foonote 14 that, contrary to the opinion of the Court below, the *Arizona* case, *supra,* is "an aberration" is completely without foundation. The structure of Board decisions in this entire area establishes beyond question the authority of the *Arizona* decision.[6] The various cases cited by Petitioners involve attempts by unions to deprive the employer of his right to designate his bargaining representative and thereby to dismantle the multi-employer

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[5] In *Brown,* the Court disagreed with the Board's judgment "as to the proper balance to be struck between [these legitimate] conflicting interests" (at p. 292). The Board's premise in *Brown* that the selective strike was lawful was undisturbed.

[6] The General Counsel of the National Labor Relations Board has stated publicly that he will not issue complaints in this line of cases where, as in *Arizona* and here, the union strikes fewer than all of the members of a multi-employer unit following impasse in bargaining and where the "evidence does not contradict [the] union's assertion that [the] selection of struck employers stemmed solely from [the] union's desire to exert greatest economic pressure without putting all of its members on strike" (General Counsel's Ruling No. S R-1994, 50 LRRM 1181 (1962)). Thus, a case of this kind will not be processed before the Board.

bargaining unit in violation of Section 8(b) (1) (B) of the National Labor Relations Act. Here, as in *Buffalo Linen, supra,* the uncontradicted evidence establishes that Respondent will deal only with the authorized representative of Petitioners so long as the authorization is unrevoked. It should be noted, in this connection, that this line of Board cases reflects the Board's concern with the stability of collective bargaining units and that the Board has established clear rules governing the procedure which must be followed by an employer in seceding from the multi-employer unit and by the union in withdrawing its consent to bargain upon a multi-employer basis. See *Washington Post Company,* 165 NLRB No. 118, 65 LRRM 1504 (1967); *Evening News Assn.,* 154 NLRB 1494, 60 LRRM 1149 (1965) and Evening News Assn., 154 NLRB 1482, 60 LRRM 1154 (1965), enforced 372 F. 2d 569 (C.A. 6. 1967); 31st Annual Report of the National Labor Relations Board (1966), pp. 89-90, 145; 32nd Annual Report of the National Labor Relations Board (1967), pp. 115-116.

We submit that, contrary to the representations made by Petitioners, the decisions and policies of the National Labor Relations Board are in harmony with the decision below.

III

PETITIONERS' ARGUMENT IS ESSENTIALLY THAT CONGRESS FAILED TO ACHIEVE ITS MAJOR PURPOSES IN ENACTING THE RAILWAY LABOR ACT

This Court has expressly recognized that among the major objectives of Congress in enacting the Railway Labor Act were the facilitation of the voluntary settlement of disputes through collective bargaining, the minimization of interruptions of commerce through strikes, but withal the preservation of the ultimate right

of the disputants to resort to self-help. See *Brotherhood of R. Trainmen* v. *Terminal Company,* 394 U.S. 369 at 378-80. Petitioners would have us believe that Congress failed dismally to accomplish these purposes.

Petitioners' argument as to the "dire financial straits" of the railroad industry (Pet. p. 17) must have an unexpressed minor premise. It would be palpable nonsense to argue that the industry is in such dire straits that it cannot stand having a few carriers struck selectively and so the solution is to require that all be struck. The unexpressed premise must be that the right only to strike them all is in reality no right to strike at all. That this is in fact the case was succinctly observed by Judge Parker in his opinion in *United Transportation Union* v. *Burlington Northern, supra* (quoted in Petition, App. 60a at 70a) where he points out that every attempt to strike nationally in recent years has resulted in a Congressionally imposed disposition. To the list of Congressional actions cited by Judge Parker in his footnote 17 should now be added the partial disposition by Pub. L. No. 91-541, Dec. 10, 1970.

Thus, by Petitioners' argument, Congress' objective of preserving a right to strike resulted only in preserving an illusion. Congress' purpose in providing a procedure for voluntary disposition of disputes through collective bargaining fared no better—at least where there is national handling. The right to strike and the possibility of a strike is an essential ingredient of collective bargaining. When that ingredient is taken away, as Petitioners would take it away, the result of national handling is not settlement of the dispute under the procedures of the Act but frustration, and ultimate disposition through *ad hoc* Congressional intervention.

IV

THE PETITION SHOULD BE PROMPTLY DENIED TO EXPEDITE COLLECTIVE BARGAINING

The Court of Appeals was evidently sensitive to the adverse effect on collective bargaining that flows from the District Court's injunction being outstanding and the mandate of the Court of Appeals being stayed. Accordingly, in its order of April 16, 1971, it conditioned the stay of its mandate beyond April 26, 1971, upon a petition for *certiorari* being filed by that date and limited the stay to the present term of this Court unless this Court has previously granted *certiorari* (Pet. App. 75a). Free collective bargaining cannot take place while one party is under injunction.

This normal consequence of an outstanding injunction is exacerbated in the present case by some of Petitioners making changes in working conditions which the Respondent and the employees it represents regard as an implementation of certain of the carrier counterproposals under the guise of existing rules. This activity led to a threatened strike on the Erie-Lackawanna and to an action by the carrier seeking an injunction in the federal district court for the Northern District of Ohio which action has been transferred to the District of Columbia, Civil Action No. 817-71. Similar activity on the Illinois Central led to the filing of a supplemental answer in the instant case. In both cases Respondent is seeking a declaratory judgment establishing its right to strike against the proposed changes and a preliminary injunction against the changes pending adjudication.

The only real solution, in the interest of both Respondent and Petitioner and of the public, is a negotiated settlement. No progress toward such a settlement is being made while the Petition is pending.

CONCLUSION

For the foregoing reasons the Petition should be denied at the earliest date consistent with this Court's consideration of the matter.

Respectfully submitted,

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